IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 8, 2005

STATE OF TENNESSEE v. PETER JAMES BATES

Direct Appeal from the Criminal Court for Sullivan County
No. S46,966 Phyllis H. Miller, Judge

No. E2004-00144-CCA-R3-CD - June 27, 2005

The appellant, Peter James Bates, was convicted by a jury in the Sullivan County Criminal Court of selling .5 grams or more of cocaine within 1,000 feet of a school. He received a sentence of twenty-four years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the sufficiency of the evidence, the trial court's rulings on various suppression motions, and sentencing. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and J.C. MCLIN, JJ., joined.

William A. Kennedy, Blountville, Tennessee, for the appellant, Peter James Bates.

Paul G. Summers, Attorney General and Reporter; William G. Lamberth, II, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Kent Chitwood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The State's proof at trial revealed that in August 2002, Sergeant Terry Johnson and Investigator Keith Feathers with the Bristol Police Department apprehended Travis Ball while he was in possession of narcotics. After his apprehension, Ball agreed to act as a confidential informant for police, arranging and making controlled buys.

Thereafter, on September 16, 2002, Ball contacted the appellant regarding the purchase of crack cocaine. Police recorded the telephone conversation in which the appellant gave Ball directions to the location where the buy would take place. Prior to leaving for the buy, Sergeant

Johnson and Investigator Feathers searched Ball for contraband, and none was found. Police also wired Ball with an electronic transmitter in order to monitor and record his transaction with the appellant. Finally, Ball was given $300 with which to purchase crack cocaine. Investigator Feathers, acting as backup, remained at the location where the search of Ball was conducted. Investigator Feathers was to monitor the conversation via radio and report to the scene if there was trouble.

Sergeant Johnson, following the directions given by the appellant, drove Ball to the location of the buy. The location was revealed to be an apartment house at 812 Virginia Avenue, which residence was leased to Larry Dotson. The apartment house was located within 1,000 feet of Fairmont Elementary School, a public school in Bristol. Immediately after Sergeant Johnson and Ball arrived at the residence, the appellant arrived in a Volkswagen Jetta. He was accompanied by a black male named Sharif. Ball exited Sergeant Johnson's car and approached the appellant and Sharif. The three men walked toward the residence. Sharif proceeded into the residence, the appellant stood in the doorway to the residence, and Ball stood on the enclosed porch just outside the doorway to the residence.

The appellant then stepped into the residence, came back to the doorway and handed Ball three small baggies containing a white rock substance which Ball believed to be crack cocaine. Ball gave the appellant $300. The appellant asked Ball if he wanted to purchase $200 or $300 worth of crack cocaine. Ball responded that he wanted $300 worth of crack cocaine. The appellant stepped back into the apartment, and when he returned, he handed Ball a fourth baggie containing white rock substance. The appellant went inside the residence, and Ball returned to the car where Sergeant Johnson was waiting.

When he got into the car, Ball immediately handed Sergeant Johnson the four baggies containing the white rock substance. The two men met with Investigator Feathers, and Ball was again searched. No contraband or money was found in his possession. Sergeant Johnson relinquished possession of the white rock substance to Investigator Feathers. Several hours later, at 8:06 p.m., Investigator Feathers turned the white rock substance into the police department evidence system.

The white rock substance was sent to the Tennessee Bureau of Investigation crime laboratory for testing. Agent Carl Smith tested the white rock substance and found it to be 1.0 gram of cocaine base.

On September 19, 2002, a search warrant was executed on 812 Virginia Avenue. No one was present at the residence when police arrived to search the premises. The search uncovered scales and baggies for the packaging of drugs and a small amount of marijuana. During the course of the search, the appellant arrived at the residence, driving the same vehicle he had been driving on September 16. Investigator Feathers asked the appellant for permission to search his person and his vehicle. The appellant consented to the searches. Investigator Feathers found $1,500 in cash on the appellant's person. In the appellant's vehicle, Investigator Feathers found a receipt from Western

Union, indicating that the appellant had sent $400 to Raymond Harris in Danville, Virginia, at 8:12 p.m. on September 16, 2002, shortly after the controlled buy took place.

Almost immediately thereafter, police requested that the appellant go to the police station to give a statement. The appellant consented. An officer drove the appellant to the station. Sergeant Johnson conducted the interview of the appellant. At 12:08 a.m. on September 20, 2002, the appellant was read his Miranda rights, and he signed a waiver of those rights.[1] The appellant gave the following statement:

> I have lived with Larry Dotson for the last week and a half at 812 Virgina Avenue apartment #1[] and I have sold crack from this location since I have lived there. Larry has also sold crack, but is not a frequent dealer. He sells occasionally to help pay his bills and to have extra money.
>
> I have crack delivered to me in Bristol, TN. This is delivered after phoning a person I know as ["]Jamaica." He lives in Danville, VA.
>
> I usually pay "Jamaica" with a money order or Western Union the money to him in Danville, VA.

After the appellant gave the statement, he was allowed to leave the police station. He was arrested for the offense a few months later.

At trial, the appellant admitted that he had a "transaction" of crack cocaine with Ball on September 16, 2001. Specifically, on cross-examination, the following colloquy occurred between the State and the appellant:

> State: Now, what you've stated here today is, is that you actually gave drugs to Travis Ball and he gave you money.
>
> The appellant: Yeah.
>
> . . . .
>
> State: Okay, and you heard him testify?
>
> The appellant: Yes, sir.

[1] See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

State: That he gave you three hundred dollars and you gave him those four rocks.

The appellant: Yes, sir.

State: Is that what happened?

The appellant: That's how it happened.

However, the appellant maintained that he obtained the crack cocaine from Sharif, and he gave Sharif all of the money from the transaction. He stated that he occasionally obtained "clientele" for Dotson and Sharif, and in return, Dotson and Sharif gave the appellant drugs to "get high for free" and gave him money for helping them. The appellant testified, "I just did what they told me to do. I mean that was in return for me staying there I guess."

The appellant explained that he had a Western Union receipt for September 16, 2002, just hours after the controlled buy, because Dotson gave him $400 to send to Jamaica in Danville, Virginia. The appellant said that his statement to police, in which he maintained that he obtained crack cocaine by sending money to Jamaica in Danville, Virginia, was partially false. He stated that Dotson and Sharif were the drug dealers, and they had contact with Jamaica. The appellant averred that he was just a "middle man." The appellant testified that he gave the statement to police because that was "what they wanted to hear." He thought that if he said what police wanted him to say, he would not have to stay in jail and could go home. The appellant stated that he was allowed to go home after he made the statement.

Based upon the foregoing proof, the jury convicted the appellant of selling .5 grams or more of cocaine within 1,000 feet of a school, a Class A felony. The trial court sentenced the appellant, as a Range I standard offender, to twenty-four years incarceration. On appeal, the appellant challenges the sufficiency of the evidence supporting his conviction; the trial court's admission of the appellant's confession; and the trial court's admission of the Western Union receipt. The appellant also contends that the trial court's imposition of the sentence violates the dictates of Blakely v. Washington, 542 U.S. __, 124 S. Ct. 2531 (2004). We will address these issues in an order different than that in which they were raised in the appellant's brief.

II. Analysis

A. Motions to Suppress

The appellant contends that the trial court erred in denying his motion to suppress his confession and by allowing the Western Union receipt to be admitted as evidence. However, we note that the appellant failed to raise either of these issues in his motion for new trial. Rule 3(e) of the Tennessee Rules of Appellate Procedure specifically provides that

> no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Accordingly, we conclude that the appellant has waived these issues.

B. Sufficiency of the Evidence

The appellant also contends that the evidence is insufficient to support his conviction. On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no "reasonable trier of fact" could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

In order to sustain the appellant's conviction, the State was required to prove that the appellant knowingly sold .5 grams or more of a substance containing cocaine within 1,000 feet of a school zone. See Tenn. Code Ann. §§ 39-17-417(a)(3) and (c)(1), 39-17-432(b) (Supp. 2002). The evidence at trial was uncontroverted that the offense occurred within 1,000 feet of Fairfield Elementary School. Additionally, the appellant did not dispute that he handed 1.0 gram of crack cocaine to Ball. Moreover, the appellant admitted that Ball paid him $300 for the crack cocaine. At trial, the appellant contended that in the transaction he was merely acting as a conduit for Sharif. The jury rejected this contention. On appeal, the appellant argues that inconsistencies in the testimony of Sergeant Johnson and Ball render the evidence insufficient. Our review of the record reveals no such inconsistencies. Regardless, even if there were inconsistencies in the proof, such proof was weighed by the jury, who, as was their prerogative, found the appellant guilty. See Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). The proof at trial overwhelmingly established the appellant's guilt of the charged offense. This issue is without merit.

C. Sentencing

As his final issue on appeal, the appellant argues that "[i]n light of Blakely v. Washington, the court erred by enhancing the appellant's sentence to 24 years." Specifically, the appellant argues, based upon the dictates of Blakley, the trial court erred in applying certain enhancement factors that were not found by the jury.

Recently in State v. Edwin Gomez, __ S.W.3d __, No. M2002-01209-SC-R11-CD, 2005 WL 856848, at *22 (Tenn. at Nashville, Apr. 15, 2005), a majority of our supreme court found that, unlike the sentencing scheme discussed in Blakely, "Tennessee's sentencing structure does not violate the Sixth Amendment." Based upon Gomez, we are compelled to conclude that in the instant case the trial court did not err in failing to submit the enhancement factors to the jury for their determination. The appellant is not entitled to relief on this issue.

III. Conclusion

Finding no error, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE